



For a thriving New England

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November 12, 2014

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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (“CLF”)¹ hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act (hereinafter “Clean Water Act” “CWA” or “Act”), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., part 135 (the “Notice”) to the

¹ CLF is a not-for-profit 501(c)(3) organization dedicated to the conservation and protection of New England’s environment.

addressed persons of CLF's intention to file suit in United States District Court of the District of New Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is two-fold. First, Harding Metals, Inc., (hereinafter "Harding Metals") is discharging stormwater directly associated with the scrap metal recycling and sales site at 42 Harding Drive, Northwood NH 03261 (the "Facility"), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, Harding Metals, has failed to obtain coverage under any Clean Water Act permit including the Multi-Sector General Permit² ("MSGP") adopted by EPA for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

BACKGROUND

The North River, (Waterbody ID NHRIV600030705-08) are within the Piscataqua-Salmon Falls watershed. The Environmental Protection Agency ("EPA") has designated the North River as impaired pursuant to Section 303(d) of the Act for failure to meet minimum water quality standards.³ The North River is impaired for mercury.⁴ Stormwater is a significant contributor to this impairment.

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.⁵ Industrial activities, such as material handling and storage, processing, reclaiming, and wholesale distribution of scrap and waste materials or other operations that occur at industrial facilities, may be exposed to stormwater.⁶ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.⁷ Harding Metals is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 2007, Harding Metals has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent ("NOI")

² ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP) [hereinafter MSGP], *available at* http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf (last visited February 13, 2012).

³ See 33 U.S.C. § 1313(d).

⁴ http://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030705-08&p_cycle=2010 (last visited October 8, 2014).

⁵ See 40 C.F.R. § 122.26(b)(13).

⁶ See 40 C.F.R. § 122.26(b)(14).

⁷ See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

within 90 days after the initial issuance of the MSGP.⁸ On September 29, 2008, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2008 permit by January 5, 2009.⁹

Harding Metals has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, Harding Metals is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Harding Metals, is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Harding Metals, has operated the Facility since at least 2007, currently advertises, by means of its website, as the operator of the Facility,¹⁰ and is registered with the New Hampshire Secretary of State Corporation Division as the operator of the Facility.¹¹ Harding Metals, and its agents and directors, including but not limited to Edso Harding, Joe Harding and Dan Daley have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the Clean Water Act.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the scrap metal recycling and sales Facility located at 42 Harding Drive Northwood, NH 03261.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Harding Metals, has, and continues to, engage in “industrial activities,” and its operations fall under SIC Code 5093, within the meaning of 40 C.F.R. § 122.26(b)(14)(vi).¹² Because the Facility has a primary SIC Code of 5093 and stormwater discharges associated with industrial activity, Harding Metals is required to apply for, obtain coverage, and comply with the requirements of a National Pollutant Discharge Elimination System (“NPDES”) permit such as the MSGP. Harding Metals has failed to take any of these required steps.

⁸ EPA’s Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995, reissued in 2000, and again in 2008. *See* 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); and 73 Fed. Reg. 56,572 (Sept. 29, 2008). *See* MSGP part 1.1 and 1.3.1.

⁹ *See* MSGP Table 1-2.

¹⁰ <http://www.hardingmetals.com/>

¹¹ <https://www.sos.nh.gov/corporate/soskb/Corp.asp?358760> (last visited October 6, 2014).

¹² *See* MSGP, Appendix D: Activities Covered, at D-4. Scrap recycling and waste recycling facilities identified by the SIC Code 5093 are subject to the requirements of the MSGP for stormwater discharges.

Harding Metals' activities at the Facility include, but are not limited to: the purchase, collection, processing and storage of scrap metal outdoors and the operation and storage of industrial equipment. Upon information and belief, the Facility's scrap piles contain, but are not limited to:

- Automobiles (including axles)
- Appliances
- Bicycle Frames
- Brake Drums & Rotors
- Busheling
- Cast Iron (heavy-breakable)
- Construction Equipment Scrap
- Demolition Scrap
- Industrial Scrap Steel
- Machinery Scrap
- Machine Shop Turnings & Cast Iron Borings
- OTM (other track material)
- #1 Heavy Melting Steel
- #2 Heavy Melting Steel (under 5')
- Plate & Structural Steel
- Railroad Scrap
- Scrap Rail Cars
- Sheet Metal
- Torching Scrap
- Aluminum (all grades)
- Aluminum Extrusions
- Cast Aluminum
- Painted Siding
- Sheet Aluminum
- Aluminum/Copper Radiators
- Batteries (lead acid-no cracks)
- Brass Plumbing Fixtures, Faucets & Fittings
- Catalytic Converters
- Copper #1 & #2
- Electric Motors
- Heater Cores
- Scrap Lead
- Radiators
- Stainless Steel
- Transmissions

and other ferrous and non-ferrous materials that are contaminated with industrial pollutants. Vehicles drive on and off the facility to deliver scrap metal. The Facility's parking and material handling areas are stained and covered with polluted sediment.

Scrap materials, refuse piles, and polluted parking and material handling areas at the Harding Metals, are exposed to precipitation and snowmelt. Precipitation falls on and flows over the scrap material, refuse piles, and polluted parking and material handling areas, picking up oil, grease, metals, solvents, nutrients, pathogens, dissolved solids, trash, and other pollutants associated with the Facility's operations. The polluted runoff is then conveyed off-site via site grading, sloped surfaces, ditches, the operation of gravity, subsurface hydrological connections and other collections and conveyances into waters of the United States.¹³

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹⁴ Harding Metals discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its Facility into waters of the United States. Because Harding Metals has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).¹⁵ By failing to apply for and comply with the specific requirements of the MSGP, Harding Metals is in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

a. Harding Metals is discharging stormwater to waters of the United States without a permit.

Harding Metals is an industrial discharger with a primary SIC Code of 5093 which means that pursuant to Section 402(p) of the Act, Harding Metals, is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because Harding Metals has operated and continues to operate without a permit under Section 402(p), Harding Metals is in violation of Section 301(a) of the Act.

In addition, during storm events, Harding Metals' "industrial activities" at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R.

¹³ See 40 C.F.R. § 122.26(c)(i)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

¹⁴ 33 U.S.C. § 1311(a).

¹⁵ See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").

§ 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches. There have been many such storm events since 2007. The Facility is generating and conveying pollutants from at least the following “point sources” – the scrap piles, refuse piles, the equipment left outdoors, the vehicles driving on and off the Facility, and other conveyances to the North River and its tributaries.¹⁶ The North River and its tributaries are “waters of the United States,” as defined in 40 C.F.R. § 122.2, and therefore, “navigable waters,” as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

b. Harding Metals is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

Harding Metals is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.¹⁷ The Facility has a primary SIC Code of 5093 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.¹⁸ Harding Metals’ failure to obtain coverage and comply with the permit is in violation of the MSGP and 33 U.S.C. § 1342(p) of the Clean Water Act.¹⁹

1) Harding Metals Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).

As a prerequisite to obtaining coverage under the MSGP, Harding Metals must prepare a Stormwater Pollution Prevention Plan (“SWPPP”).²⁰ The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.²¹ Harding Metals has failed to develop a SWPPP in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

2) Harding Metals Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.

¹⁶ These discharges constitute “point sources” as defined at 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2, as interpreted by applicable case law.

¹⁷ MSGP part 1.1 and 1.2.

¹⁸ See MSGP part 1.1; MSGP part 8.N.

¹⁹ A thorough search of EPA’s Electronic Stormwater Notice of Intent database reveals that Harding Metals has not filed an NOI for the Facility. EPA’s Electronic Stormwater Notice of Intent database, <http://cfpub.epa.gov/npdes/stormwater/noi/noisearch.cfm> (last visited October 9, 2014).

²⁰ See MSGP part 5.

²¹ See MSGP part 5.1.

To be eligible to discharge under the MSGP, Harding Metals must submit a complete Notice of Intent (“NOI”) to the EPA.²² To complete the NOI, Harding Metals is required to determine whether the body of water the stormwater is discharged to is an “impaired” water body, and whether the Facility discharges any specific pollutants listed on the NOI to that water body.²³ The North River is classified as “impaired” water.²⁴ Because Harding Metals is a “New Discharger” under the MSGP,²⁵ it must also provide data and other technical information to EPA to discharge to impaired waters,²⁶ as well as implement and maintain any control measures or conditions to meet applicable water quality standards.²⁷ Additionally, as part of preparing the NOI, the covered Facility must make certain verifications such as verifying that no harm is done to a species in violation of the Endangered Species Act.²⁸ Harding Metals has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) Harding Metals Must Take Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, Harding Metals must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. Harding Metals must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.²⁹ These control practices must be in accordance with good engineering practices and manufacturer’s specifications.³⁰ If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.³¹ Harding Metals has failed to cover the materials and operations that may result in polluted stormwater runoff. Harding Metals has not implemented the required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

²² See MSGP part 1.3.1.

²³ See MSGP part 2.2.2.

²⁴ See *supra* p. 2.

²⁵ See MSGP, Appendix A: Definitions, Abbreviations, and Acronyms, at A-4 (defining the term “new discharger” as “a facility from which there is a discharge, that did not commence the discharge at a particular site prior to August 13, 1979, which is not a new source, and which has never received a finally effective NPDES permit for discharges at that site”); see also 40 C.F.R. § 122.2.

²⁶ See MSGP part 1.1.4.7.

²⁷ See MSGP part 2.2.2.3.

²⁸ See MSGP part 1.1.4.5 and 2.3.

²⁹ See MSGP part 2.1.

³⁰ *Id.*

³¹ *Id.*

4) Harding Metals Must Conduct Routine Facility Inspections.

To be eligible to discharge under the MSGP, Harding Metals must conduct routine inspections of all areas of the Facility where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.³² Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.³³ These inspections must occur when the Facility is in operation.³⁴ The schedule of these inspections must be included in the Facility's SWPPP and be performed by qualified personnel.³⁵ Harding Metals has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

5) Harding Metals Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, Harding Metals must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.³⁶ The MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.³⁷ An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.³⁸ Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.³⁹ All monitoring data collected under the MSGP must be reported to EPA. Furthermore, because the receiving waters are "impaired waters" under 33 U.S.C. § 1313(d), Harding Metals must monitor for all pollutants for which they are impaired.⁴⁰ Harding Metals has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) Harding Metals Must Carry out the Required Reporting and Recordkeeping.

³² See MSGP part 4.1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See MSGP part 6.

³⁷ See MSGP part 6.2.

³⁸ See MSGP part 6.1.1.

³⁹ See MSGP part 6.1.3.

⁴⁰ See MSGP part 6.2.4

Harding Metals must maintain and submit any and all required monitoring data.⁴¹ Such monitoring data includes the following: an annual report to EPA which includes the Facility's findings from the annual comprehensive site inspection and any documentation of correction actions;⁴² an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;⁴³ and any other required reports under the MSGP.⁴⁴ Harding Metals has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

7) Harding Metals Must Comply with the Requirement of MSGP Subpart N.

Harding Metals must also comply with the sector-specific requirements contained in Subpart N of the MSGP.⁴⁵ Subpart N requires scrap recycling and waste recycling facilities to implement additional technology-based effluent limits,⁴⁶ meet additional SWPPP and inspection requirements,⁴⁷ and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to metal recycling facilities.⁴⁸ Harding Metals must also minimize contact of stormwater runoff with stockpiled materials, processed materials and non-recyclable wastes through various control measures such as permanent or semi-permanent covers, oil and water separators, sumps and dry absorbents for areas where potential sources of residual fluids are stockpiled.⁴⁹ Harding Metals has failed to comply with the requirements of Subpart N of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which Harding Metals operates its Facility without permit coverage or discharges stormwater without a permit from the Facility is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

Harding Metals has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day since at least 2009 on which there has been a measurable precipitation event.

⁴¹ See MSGP part 7.1

⁴² See MSGP part 7.2.

⁴³ See MSGP part 7.3.

⁴⁴ See MSGP part 7.4.

⁴⁵ See MSGP, Appendix D, Table D-1, Sector N.

⁴⁶ See MSGP part 8.N.3.

⁴⁷ See MSGP part 8.N.4 and 8.N.5.

⁴⁸ See MSGP 8.N.6.

⁴⁹ See MSGP part 8.N.3.1.2.

Every day, since at least 2009, on which Harding Metals has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

These violations are ongoing and continuous, and barring a change in the stormwater management controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Harding Metals is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects Harding Metals to a penalty up to \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for each violation that occurred after January 12, 2009.⁵⁰ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring Harding Metals to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

⁵⁰ 40 C.F.R. § 19.2



Sincerely,

A handwritten signature in blue ink, appearing to read "Zachary K. Griefen", is written over a horizontal line.

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